STATE OF MICHIGAN

COURT OF APPEALS

DELTA PROPERTIES, INC.,

Plaintiff/Counter Defendant-Appellee/Cross-Appellant,

v

MOTOR WHEEL CORPORATION,

Defendant/Counter Plaintiff-Appellant/Cross Appellee.

UNPUBLISHED
September 9, 1997

No. 177965
Ingham Circuit Court
LC No. 91-070108-CZ

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

In 1986, defendant sold certain industrial real estate referred to as "the Foundry" to plaintiff under the terms of the parties' negotiated Agreement for Sale of Real Estate. The transaction was in the nature of a land contract, with plaintiff liable to defendant under a promissory note secured by a mortgage. In 1990, a third party offered to buy the land from plaintiff, but withdrew the offer when it was discovered that a hazardous waste storage site on the property had never been closed with the appropriate certification by the Department of Natural Resources. Plaintiff then ceased making its payments to defendant and brought this suit alleging breach of contract, fraudulent misrepresentation, innocent misrepresentation, and violation of the Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq*.; MSA 14.528 *et seq*. [now MCL 324.1701 *et seq*.; MSA 13A.1701 *et seq*.]. Defendant counterclaimed and sought the balance owed on the sale, approximately $1,219,000 inclusive of interest and late charges. The trial court dismissed the MEPA claim and refused to grant plaintiff's request for rescission of the sale agreement. The jury, in a special verdict, found that defendant seller did not breach the sale agreement and that there was no fraudulent misrepresentation, but that defendant innocently misrepresented to plaintiff how long DNR closure of the hazardous waste storage site would take. Plaintiff was awarded damages in the amount of $175,000. As for defendant's counterclaim, the jury found that plaintiff buyer had breached the parties' sale agreement. However, because the special verdict form reflected the trial court's earlier ruling that defendant's misrepresentation would excuse the breach, defendant was not awarded damages. Defendant appeals as of right from that part of the judgment awarding plaintiff damages on the misrepresentation claim, as

well as the determination that the misrepresentation barred its counterclaim. Plaintiff cross-appeals from the dismissal of its MEPA claim and the trial court's decision that plaintiff was not entitled to rescission of the sale agreement. We vacate in part and remand for a new trial, as to damages only, on defendant's counterclaim.

Plaintiff is a real estate development company that buys and resells industrial properties. It purchased the subject 11-acre Foundry parcel from defendant, a wheel manufacturer, in December, 1986, for $1,125,000. Several months of negotiations preceded the sale, primarily between plaintiff's principal shareholders, Bruce and Joel Langois, and defendant's corporate counsel, Dale Martin. Plaintiff was aware that the parcel included a hazardous waste storage site. Defendant had stopped using this site in 1981, but did not commence the required regulatory closure process with the Environmental Protection Agency and the DNR until 1986. As part of the sale agreement, the parties agreed that defendant would take the necessary steps to comply with the governmental agencies' closure requirements and would have access to the property as needed to complete the closure. The agreement did not set an anticipated date for the DNR's certification of the site as closed. Plaintiff contended, however, that Martin informed the Langois that that the DNR closure would be complete by the following spring or within a short time.

Apparently due almost entirely to bureaucratic delays, the DNR did not officially certify the site as closed until October 1992. During the six-year interim, in 1990, a third party offered to buy the Foundry from plaintiff. That deal fell through, however, when the third party learned that the DNR's closure of the hazardous waste storage site was still pending.

On December 26, 1990, plaintiff informed defendant that because of misrepresentations made during the negotiation process, it would no longer make its monthly payments for the purchase of the property, eventually leading to this action. As relevant to this appeal, plaintiff contended that during the 1986 negotiations, defendant was aware that plaintiff might re-sell the property, that plaintiff needed DNR-approved closure of the hazardous waste storage site to make the property marketable, and that defendant's parent company had indicated to defendant in a letter dated November 4, 1986 that "[i]t is anticipated that the [DNR's] closure process will continue well beyond the closing of the sale."

As previously indicated, the jury found defendant liable for innocent misrepresentation. The jury also found that plaintiff breached the sale agreement by refusing to pay the balance owed. Because the trial court ruled that defendant's misrepresentation was a complete defense to the counterclaim, however, the jury was precluded from awarding damages for plaintiff's breach. Thus, plaintiff retained ownership of the Foundry and the DNR-certified hazardous waste storage site, was excused from paying the remaining purchase price of approximately $1,200,000, and received $175,000 in damages.

On appeal, defendant contends that the trial court erred in denying its motions for summary disposition and directed verdict on plaintiff's claim of innocent misrepresentation. A claim of innocent representation requires proof that (1) the defendant made a material representation, (2) the representation was false, (3) the representation was made without knowledge of its truth or falsity, (4) defendant made the representation with the intention that it be relied upon by the plaintiff, (5) the plaintiff acted in reliance upon the representation, (6) the plaintiff was injured, and (7) the defendant benefited

from the representation and the plaintiff's

reliance on it. *State-William Partnership v Gale*, 169 Mich App 170, 178; 425 NW2d 756 (1988). See also *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919). The absence of any of these elements is fatal to recovery. *Id.* In this case, defendant contends that the evidence did not establish the first element. We agree.

It is well established that, for purposes of a claim of misrepresentation, the alleged material representation must relate to a statement of past or then-existing fact. *Hi-Way, supra*, p 336. Future promises are contractual and do not constitute fraud. *Id.* Moreover, there can be no fraud where a person has the means to determine that a representation is not true. *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992); *Schuler v American Motors Sales Corp*, 39 Mich App 276, 280; 197 NW2d 493 (1972); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Here, the alleged misrepresentation made during negotiations for the sale of the Foundry was that the DNR would complete its closure certification process "in a short time." This is an expression of the DNR's anticipated action. It is clearly a promise of future expectation and not a statement of present or past fact. *Webb, supra*, p 473. Broken promises of future action are not actionable in tort. *Hi-Way, supra*, p 339. See also *Van Tassel v McDonald Corp*, 159 Mich App 745, 750-753; 407 NW2d 6 (1987). Furthermore, plaintiff had the means to determine whether or not the statement was true. *Webb, supra*. It had only to contact the DNR to confirm when the agency anticipated that the closure process would be complete, or to ascertain the usual length of time required to certify the closure of a hazardous waste storage site. Although plaintiff was in the business of buying and selling industrial properties and this deal involved over one million dollars, it chose not to do so.

Because the statement relied on by plaintiff was an assertion concerning the DNR's anticipated future action, and because plaintiff had the means to determine whether that prediction was accurate, it was not actionable as a tort. *Hi-Way, supra; Webb, supra.* Accordingly, the trial court erred in denying defendant's motions for summary disposition or directed verdict on plaintiff's innocent misrepresentation claim, and we vacate that portion of the judgment awarding plaintiff $175,000 on the claim. This disposition makes it unnecessary to address defendant's further arguments. We recognize, however, that the absence of an actionable misrepresentation claim affects the status of defendant's counterclaim, since the trial court ruled that the "misrepresentation" precluded defendant from recovering on its counterclaim. In light of the jury's finding that plaintiff breached the parties' contract when it ceased making payments, a new trial to determine liability on defendant's counterclaim is not necessary. We therefore remand for a new trial on the counterclaim, limited to the issue of defendant's damages in light plaintiff's breach.

In its cross-appeal, plaintiff argues that the trial court erred in granting defendant's motion to dismiss plaintiff's MEPA claim. We find no error. Under the MEPA, state and local governments, as well as private individuals and entities, may maintain an action for the protection of the air, water, and other natural resources where pollution, impairment, or destruction has or is likely to occur. MCL 691.1202(1); MSA 14.528(202)(1) [now MCL 324.1701(1); MSA 13A.1701(1)]. A prima facie case is established if (1) a natural resource is involved and (2) the impact of the activity on the environment rises to the level of impairment that justifies judicial

intervention. *Attorney General ex rel Dep't of Natural Resources v Huron Co Rd Comm*, 212 Mich App 510, 520; 538 NW2d 68 (1995); *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 504; 499 NW2d 383 (1993).

In this case, the trial court correctly found no meaningful evidence that there was a likelihood of damage to a natural resource. Plaintiff's expert, Bernard Sheff, testified that there was a "good possibility of contamination" at the Foundry site. This opinion, however, was too speculative to present a prima facie case under the MEPA. Sheff testified that his site assessment identified "areas of concern" where "something" "might have been" released into the ground, and that soil borings were recommended to evaluate the presence of contaminates. Those soil borings were not undertaken, however. As the trial court concluded, the absence of analytical data to support the expert's concerns and a need for further evaluation of the site to determine if there was likely damage to a natural resource made summary disposition of the MEPA claim appropriate; there was simply not enough evidence that the impact of the contamination rose to a level justifying judicial intervention. *Dafter Landfill*, *supra; Attorney General*, *supra*. Further, although plaintiff correctly asserts that defendant admitted the site was contaminated, that admission, without more, does not give rise to a prima facie case of likely damage to a natural resource. See *Dafter Landfill*, *supra*, pp 504-505.

Finally, plaintiff contends that the trial court erred in concluding that plaintiff was not entitled to rescission of the sale agreement because it waited too long – until December 1990 – to demand that remedy. Again, we disagree. Plaintiff's explanation for the delay, that it did not know of the alleged misrepresentation until discovery in this litigation, is without merit. As the trial court correctly reasoned, defendant's "misrepresentation" concerning an anticipated spring 1987 DNR closure of the hazardous waste storage site should have been apparent to plaintiff once the spring of 1987 passed without completion of the closure process. We also reject plaintiff's claim that its delay in seeking rescission was due to its trusting relationship with defendant, a tenant in one of plaintiff's other properties. Again, regardless of any trusting relationship, plaintiff should have been cognizant of defendant's "misrepresentation" by the end of spring 1987 and it could have much earlier raised the question why the closure was not then completed. To warrant rescission, a plaintiff must seek the remedy without unnecessary delay upon discovery of fraud. *Livingston v Krown Chemical Mfg, Inc*, 394 Mich 144, 152; 229 NW2d 793 (1975), quoting *Wall v Zynda*, 283 Mich 260, 265; 278 NW 66 (1938). We find no error in the trial court's conclusion that, by waiting until 1990 to demand rescission, plaintiff unnecessarily sat on its rights and thus waived that remedy. To the extent plaintiff also argues that the trial court made no finding that defendant was prejudiced by the delay, neither party raised the purported lack of prejudice and plaintiff did not allege nonprejudice in response to defendant's affirmative defense of laches. We therefore decline to reverse on that ground.

Vacated in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor